Filed 2/4/20 P. v. Super. Ct. (Tony B.) CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; TONY B., Real Party in Interest.	B294813 (Los Angeles County Super. Ct. Nos. MA066321, MJ23850)

ORIGINAL PROCEEDING; petition for writ of mandate. Daviann L. Mitchell, Judge. Petition granted.

Jackie Lacey, District Attorney of Los Angeles County, Matthew Brown and John Pomeroy, Deputy District Attorneys, for Petitioner.

No appearance for Respondent.

Public Defender of Los Angeles County, Albert J. Menaster and Robert C. Lu for Real Party in Interest.

The District Attorney of Los Angeles County filed a petition for writ of mandate after the superior court determined that minor Tony B., charged with murder and burglary, could not be tried as an adult due to the passage of Senate Bill 1391 (2017–2018 Reg. Sess.) (Stats. 2018, ch. 1012, § 1, eff. Jan. 1, 2019) (SB 1391), which, in almost all circumstances, prohibits transfer of 14- and 15-year-olds to criminal court. The District Attorney argues that SB 1391 is invalid because it is inconsistent with and does not further the intent of Proposition 57, the Public Safety and Rehabilitation Act of 2016.

Proposition 57 eliminated "direct filing" of criminal cases against minors in criminal court. The initiative, however, still allowed for transfer of a 14- or 15-year-old to criminal court in limited circumstances: if the offense charged was a severe felony listed in the statute (including murder), and if the juvenile court determined, after an extensive fitness hearing involving consideration of five statutory criteria, that transfer was appropriate. (See Welf. & Inst. Code, former § 707, subd. (a)(2),[1] as amend. by Prop. 57, Gen. Elec. (Nov. 8, 2016) § 4.2, eff. Nov. 9, 2016.) The juvenile court in this matter previously concluded that Tony B. was not likely to be successfully treated in the juvenile system and ordered transfer of his case to the criminal court.

SB 1391 amended section 707 in pertinent part by eliminating the ability of a prosecutor to seek transfer of any 14- or 15-year-old, no matter the offense charged, unless the juvenile is not apprehended prior to the time he or she turns 18. (§ 707, subd. (a)(2).) In this case, by its terms, section 707 mandates

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[1] All further statutory citations are to the Welfare and Institutions Code unless otherwise indicated.

that Tony B.'s case proceed in the juvenile court, and, accordingly, in January 2019, the criminal court transferred the matter back to juvenile court.

Our task is to determine whether SB 1391 amended section 707 in a manner that contravenes Proposition 57. Proposition 57 affirmatively permitted and was intended to allow for the prosecution of 14- and 15-year-olds in adult criminal court under limited circumstances, if a judge decided that such prosecution was warranted. SB 1391, on the other hand, essentially prohibits adult prosecution of 14- and 15-year-olds. We conclude that SB 1391 is not consistent with, and does not further, the intent of Proposition 57. Accordingly, we direct the trial court to vacate the order transferring the matter to the juvenile court.

BACKGROUND

Facts and procedural history

In June 2015, when he was 14, Tony B. allegedly entered a house to burglarize it, armed himself with a knife, accidently woke the 86-year-old sole occupant, killed her by stabbing her 41 times, left the house to observe, and then reentered the house and completed the burglary. He was on probation at the time for a prior burglary.

Tony B.'s case was initially filed in the criminal court, but after the passage of Proposition 57 it was certified to the juvenile court for consideration of a motion to transfer. The juvenile court reviewed a probation officer's report on Tony B.'s behavioral patterns and social history, took briefing, and held a three-day evidentiary hearing.

At the conclusion of the hearing, the juvenile court found that Tony B. was not likely to be successfully treated in the juvenile system and ordered his case transferred to criminal

court. The court determined that Tony B. exhibited a high degree of criminal sophistication, acted without the influence of anger or peer pressure, and chose to kill the victim when he instead could have fled. The court noted that Tony B. had been acting out for years and had an escalating pattern of delinquent behavior.

Tony B. filed a petition for writ of mandate in this court challenging the transfer order. We issued an order to show cause and ultimately denied the petition, finding that the transfer order was not an abuse of discretion. (See *Tony B. v. Superior Court* (May 29, 2018, B285555) [nonpub. opn.].)

Following remittitur, the case went back to the criminal court, but the criminal court, in its October 2018 minutes, noted that the case would "likely return to juvenile court" due to the passage of SB 1391. Prior to the effective date of SB 1391, the District Attorney filed a brief opposing transfer. The criminal court heard argument in January 2019 and ordered the case transferred to the juvenile court, stating: "While I may have feelings that this case is the type of a case that was envisioned to stay in adult court, I will respect what the Legislature has decided, and I will grant the defense's request."

This petition for writ of mandate followed. We ordered superior court proceedings stayed, issued an order to show cause, and received briefing from the parties.

Statutory background

In the period prior to 1995, minors younger than 16 could not be tried as adults in criminal court. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 677 *(Jones*); *Hicks v. Superior Court* (1995) 36 Cal.App.4th 1649, 1655.) This changed effective January 1, 1995, when section 707 was amended to allow for criminal prosecution of 14- and 15-year-olds, and rendered them,

under certain situations, presumptively unfit for treatment as juveniles. (*Jones, supra,* at pp. 677-678; Stats. 1994, ch. 453, § 9.5, former § 707.) Further amendments in 1999 and 2000 gave prosecutors, in certain circumstances, discretion to directly file cases against 14- and 15-year-olds in criminal court, and, in some situations, required prosecution in criminal court. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 548-550.)

Proposition 57 "largely returned California to the historical rule." (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 305 (*Lara*).) It eliminated direct filing in criminal court against minors and required a fitness hearing if transfer to criminal court was sought, with no presumption of unfitness for juvenile court. (*Ibid.*) Fourteen- and 15-year-olds could still be prosecuted in criminal court under Proposition 57, but only if they were alleged to have committed a listed severe crime and the juvenile court, following a fitness hearing and a consideration of statutory criteria, determined that transfer was appropriate. (See former § 707, subds. (a)(2), (b), as amend. by Prop. 57, Gen. Elec. (Nov. 8, 2016) § 4.2.)

Pertinent here, the text of Proposition 57 contained language allowing for further legislative amendment of the statutes pertaining to treatment of juvenile offenders. Section 5 of Proposition 57 stated: "This act shall be broadly construed to accomplish its purposes. The provisions of Sections 4.1 [amending section 602] and 4.2 [amending section 707] of this act may be amended so long as such amendments are consistent with and further the intent of this act by a statute that is passed by a majority vote of the members of each house of the Legislature and signed by the Governor." (Voter Information Guide, Gen.

Elec. (Nov. 8, 2016) text of Prop. 57, § 5, p. 145 (Voter Information Guide).)

Contending to act under this authority, the Legislature passed SB 1391 (SB 1391, § 3), and the Governor signed it (see Governor's message to Sen. on SB 1391 (Sept. 30, 2018) Sen. J. (2017-2018 Reg. Sess.) p. 6230).

DISCUSSION

The Legislature itself may amend an initiative statute if the initiative permits amendment without voter approval. (Cal. Const., art. II, § 10, subd. (c).) Proposition 57 allowed for amendment of section 707 without voter approval so long as the amendment was consistent with the intent and furthered the intent of the proposition. (Voter Information Guide, *supra*, text of Prop. 57, § 5, p. 145; see also *People v. Superior Court* (*T.D.*) (2019) 38 Cal.App.5th 360, 372, review granted Nov. 26, 2019, S257980 (*T.D.*).) An amendment of an initiative statute includes a legislative act that changes the statute by adding or taking away a provision. (*People v. DeLeon* (2017) 3 Cal.5th 640, 651 (*DeLeon*); *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571.) SB 1391 amended section 707 in pertinent part by revising the language that previously allowed for transfer of 14- and 15-year-olds to apply only to those "not apprehended prior to the end of juvenile court jurisdiction." (See § 707, subd. (a)(2).)

When examining whether an amendment to an initiative is proper, courts "'start[] with the presumption that the Legislature acted within its authority' and uphold the validity of the legislative amendment 'if, by any reasonable construction, it can be said that the statute furthers the purpose' of the initiative." (*DeLeon, supra,* 3 Cal.5th at p. 651.) All doubts are resolved in favor of the legislative act. (*Amwest Surety Ins. Co. v. Wilson*

(1995) 11 Cal.4th 1243, 1252 (*Amwest*).) Still, a limitation allowing only for amendments that further an initiative's purposes "must be given the effect the voters intended it to have. . . . In the absence of effective judicial review, drafters of future initiatives might well feel compelled to withhold such legislative authority completely, lest even the most limited grant of authority to amend be used by the Legislature to curtail the scope of the initiative." (*Id.* at pp. 1255-1256.)

In the brief time since its passage, a number of appellate courts have analyzed the validity of SB 1391. Most of these courts have concluded that SB 1391 was a permissible amendment of section 707. (*People v. Superior Court* (*Alexander C.*) (2019) 34 Cal.App.5th 994 (*Alexander C.*); *People v. Superior Court* (*K.L.*) (2019) 36 Cal.App.5th 529 (*K.L.*); *T.D., supra,* 38 Cal.App.5th 360, review granted Nov. 26, 2019, S257980; *People v. Superior Court* (*I.R.*) (2019) 38 Cal.App.5th 383, review granted Nov. 26, 2019, S257773 (*I.R.*); *People v. Superior Court* (*S.L.*) (2019) 40 Cal.App.5th 114, review granted Nov. 26, 2019, S258432 (*S.L.*); *B.M. v. Superior Court* (2019) 40 Cal.App.5th 742 (*B.M.*) review granted Jan. 2, 2020, S259030; *Narith S. v. Superior Court* (2019) 42 Cal.App.5th 1131.) So far, only one court has deemed SB 1391 unconstitutional (*O.G. v. Superior Court* (2019) 40 Cal.App.5th 626, review granted Nov. 26, 2019, S259011[2] (*O.G.*)), though several dissenting opinions have also

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[2] In each of the cases where review has been granted, the Supreme Court has framed the issue as whether SB 1391 unconstitutionally amended Proposition 57 by eliminating the possibility of transfer to adult criminal court for 14- and 15-year-olds.

weighed in against a finding of validity (*T.D., supra,* at p. 378 (dis. opn. of Poochigian, J.), review granted; *I.R., supra,* at p. 396 (dis. opn. of Poochigian, J.), review granted; *S.L., supra,* at p. 123 (dis. opn. of Grover, J.), review granted; *B.M., supra,* at p. 761 (dis. opn. of McKinster, J.), review granted).

The Supreme Court has provided guidance on the proper method for interpreting initiatives. When an amendment enacted by initiative "'is subject to varying interpretations, evidence of its purpose may be drawn from many sources, including the historical context of the amendment, and the ballot arguments favoring the measure.'" (*Amwest, supra,* 11 Cal.4th at p. 1256.) When the language of an initiative is "not ambiguous," however, "we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571 (*Pearson*).) We believe that the language of Proposition 57 is clear. Therefore, its intent can be determined by giving the words of its text "their ordinary meaning and construing this language in the context of the statute and initiative as a whole." (*Pearson,* at p. 571.)

A. The fifth purpose

The most natural starting point for determining the intent is Proposition 57's aptly titled "Purpose and Intent" section. (Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141.) While we are not limited to this statement of purpose in our analysis, we are "guided by" it. (*Amwest, supra,* 11 Cal.4th at p. 1257; see also *Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374 (*Gardner*); *T.D., supra,* 38 Cal.App.5th at p. 372.) Proposition 57 contained the following uncodified statement of

purposes and intents: "In enacting this act, it is the purpose and intent of the people of the State of California to: [¶] 1. Protect and enhance public safety. [¶] 2. Save money by reducing wasteful spending on prisons. [¶] 3. Prevent federal courts from indiscriminately releasing prisoners. [¶] 4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles. [¶] 5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141.)

The fifth of these purposes and intents is expressly applicable to the issue presented in this case. Proposition 57, in the manner it amended section 707, imposed the requirement of a fitness hearing in all cases in which a juvenile was sought to be tried as an adult. (*Lara, supra,* 4 Cal.5th at p. 303.) Under this process, only a juvenile court judge could order that a juvenile be tried as an adult. (*Ibid.*) The fifth purpose of Proposition 57 encapsulated this procedure, providing that a judge, not a prosecutor, would decide whether juveniles should be tried in adult criminal court. (Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141.)

SB 1391 changes this procedure, as it "eliminates prosecutors' ability to seek transfer of 14 and 15 year olds from juvenile court to criminal court, except where such a minor is alleged to have committed a specified serious offense and is not apprehended prior to the end of juvenile court jurisdiction." (*T.D., supra,* 38 Cal.App.5th at p. 368.) It thereby eliminates a juvenile court judge's authority to hold a fitness hearing to decide whether a 14- or 15-year-old should be tried in adult court *(S.L., supra,* 40 Cal.App.5th at p. 120), except in the rare circumstance where the juvenile is apprehended long after the offense.

Proposition 57 authorized the Legislature to amend section 707, but this authority was limited; any amendment had to be "consistent with" and "further" the intent of the initiative. (Voter Information Guide, *supra*, text of Prop. 57, § 5, p. 145.) We do not believe an amendment that prohibits a judge from ordering a 14- or 15-year-old transferred to criminal court is consistent with and furthers the intent of "[r]equir[ing] a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (*Id.* at § 2, p. 141.)

If Proposition 57 had limited the class of juveniles potentially subject to prosecution in criminal court to those 16 and older, then SB 1391 would not violate the intent. But Proposition 57 did no such thing. Instead, it specifically provided that 14- and 15-year-olds were subject to prosecution in criminal court if so ordered by the juvenile court following a fitness hearing. (Voter Information Guide, *supra*, text of Prop. 57, § 4.2, p. 142; former § 707, subds. (a), (b).) SB 1391 eliminates this option, stripping judges of the ability to make transfer decisions pertaining to 14- and 15-year-olds, who were previously considered juveniles potentially subject to transfer under Proposition 57.

In finding SB 1391 to be a permissible amendment, some courts have sought to read into the fifth purpose an emphasis on the elimination of direct filing by prosecutors. For example, *K.L.* found that the "language does not suggest a focus on retaining the ability to charge juveniles in adult court so much as removing the discretion of district attorneys to make that decision." (*K.L., supra,* 36 Cal.App.5th at p. 539.) Similarly, the court in *B.M.* concluded, "The purpose of the juvenile offender provisions is to check prosecutorial discretion and abolish direct filing . . . ."

(*B.M., supra,* 40 Cal.App.5th at p. 758; see also *T.D., supra,* 38 Cal.App.5th at pp. 373-374; *S.L., supra,* 40 Cal.App.5th at p. 121.)

Respectfully, we believe that in emphasizing only the elimination of direct filing, these courts have effectively negated the language allowing for a judge to make transfer decisions, thereby running afoul of basic rules of construction. "When we interpret an initiative, we apply the same principles governing statutory construction." (*Pearson, supra,* 48 Cal.4th at p. 571.) The language of an initiative is given its ordinary and plain meaning, avoiding an interpretation that renders any language mere surplusage. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1097; *People v. Lewis* (2016) 4 Cal.App.5th 1085, 1092-1093.)

By its plain terms, the fifth intent and purpose of Proposition 57 was that judges would decide whether juveniles (including 14- and 15-year-olds) should be tried in adult court. If eliminating direct filing was the sole concern of the fifth purpose, then its language would have reflected that point; the text could have simply omitted reference to the judge making the decision. But the text did not omit this language. Instead, the stated intent was to "[r]equire a judge . . . to decide whether juveniles should be tried in adult court." (Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141.) As a basic rule of construction, this language cannot be rendered mere surplusage. Indeed, there is no reason to omit this language. The purpose of allowing a judge to decide whether juveniles should be tried in adult court is not at all inconsistent with the purpose of eliminating direct filing. And the language of the fifth purpose can be read in harmony with the remainder of Proposition 57. Giving effect to the entirety of the

stated intents and purposes—including that a judge makes the transfer decision—does not lead to an absurd result.

Thus, to the extent it eliminates the authority of the juvenile court to order transfer of 14- and 15-year-olds, SB 1391 is inconsistent with and does not further the purpose and intent of requiring a judge to decide whether juveniles should be tried in adult court. In this respect, SB 1391 falls outside the limited scope of authority granted to the Legislature to amend section 707.

B. Specific language of the statute

Our analysis is also guided by the specific language of section 707 itself, as effectuated by Proposition 57. (See *Amwest, supra,* 11 Cal.4th at p. 1260; *Gardner, supra,* 178 Cal.App.4th at p. 1374.) Again, the language of the former section 707 was not ambiguous. It provided that a 14- or 15-year-old, alleged to have committed certain offenses, could be transferred to adult criminal court if the juvenile court judge, following consideration of relevant evidence and criteria, determined that transfer was appropriate. (See former § 707, subds. (a)(2), (b), as amend. by Prop. 57, Gen. Elec. (Nov. 8, 2016) § 4.2, p. 142.)

Proposition 57 clearly allowed, in certain circumstances, for adult prosecution of 14- and 15-year-olds, as reflected in the former section 707. In contrast, "Senate Bill 1391 goes a step beyond Proposition 57 and shields an *entire class* of minors from criminal court." (*B.M., supra,* 40 Cal.App.5th at p. 755.) As stated in *O.G.,* "The language of Proposition 57 permits adult prosecution and Senate Bill 1391 precludes such prosecution." (*O.G., supra,* 40 Cal.App.5th at p. 629.) By altering the terms of section 707 in such a significant respect, SB 1391 cannot be said

to further the intent of Proposition 57. (See *Amwest, supra,* 11 Cal.4th at p. 1261; *Gardner, supra,* 178 Cal.App.4th at p. 1377.)

Tony B. avers that an overly stringent interpretation of Proposition 57's amendment provision will prohibit any substantive amendment, rendering the amendment provision a nullity. He cites to *Alexander C.*, which reasoned, "if any amendment to the provisions of an initiative is considered inconsistent with an initiative's intent or purpose, then an initiative such as Proposition 57 could never be amended. There would be no purpose to having included, as Proposition 57 does, language expressly allowing legislative amendments that 'are consistent with and further the intent' of the proposition." (*Alexander C., supra,* 34 Cal.App.5th at p. 1003.) Other courts have followed this reasoning in discussing the amendment provision. (See *T.D., supra,* 38 Cal.App.5th at p. 372; *S.L., supra,* 40 Cal.App.5th at p. 122; *B.M., supra,* 40 Cal.App.5th at p. 760.)

While we agree with the general premise that a provision allowing for amendment should not be too narrowly construed lest it be effectively nullified, we do not believe this concern can justify an otherwise improper amendment of an initiative statute. It is correct that, given its amendment provision, Proposition 57 anticipated future amendment of section 707. And it is possible to think of hypothetical amendments to section 707 that might have furthered the intent of Proposition 57, while still preserving the stated intent of allowing a judge to decide, in appropriate circumstances, that a 14- or 15-year-old should be tried in criminal court. For instance, the former section 707, subdivision (b), contained a fairly extensive list of offenses that subjected a 14- or 15-year-old to a possible transfer motion. (See former § 707, subd. (b)(1)-(30).) A legislative amendment that limited

those offenses to only murder and violent sex crimes, for example, would narrow the class of 14- and 15-years-olds potentially subject to trial in criminal court, but still allow a judge to make a transfer decision in an appropriate case. Or, alternatively, the Legislature might have chosen to amend the criteria governing a juvenile court's transfer determination, setting a higher bar for transfer. Again, these are just hypothetical examples, and we do not intend to tell the Legislature how to do its job or to determine the constitutionality of hypothetical amendments. The point is: SB 1391 did not represent the only potential way of amending Proposition 57.

Given these findings—that SB 1391 violates a stated purpose and intent of Proposition 57 and directly contradicts the statutory language itself—we must conclude that SB 1391 is not consistent with the intent and does not further the intent of the proposition. In so holding, we do not intend to comment on the policy choice of generally eliminating adult prosecution of 14- and 15-year-olds. That is a subject for the electorate and, if appropriate, the Legislature. The authority granted to the Legislature by Proposition 57, however, was limited. The Legislature's authority was constrained by the text of the initiative. Because SB 1391 exceeds the authority granted, we find that it is invalid insofar as it prohibits juvenile courts from ordering 14- and 15-years-olds transferred to adult criminal court.

DISPOSITION

The petition is granted. A writ of mandate hereby issues directing the trial court to vacate its January 2, 2019 order transferring the case to juvenile court and to enter a new and different order denying Tony B.'s request to transfer the case to juvenile court. The stay of trial court proceedings issued January 7, 2019, shall dissolve upon issuance of the remittitur.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P.J.
ASHMANN-GERST

I concur:

_____, J.
CHAVEZ

The People v. Superior Court of Los Angeles County (Tony B.), B294813
HOFFSTADT, J., dissenting:

The question presented by this writ petition seems straightforward enough. Answering it is anything but.

As the majority ably explains, the voter-initiative enacted Proposition 57, by its own terms, may only be amended by our Legislature "so long as such amendments are consistent with and further the intent" of the proposition. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 5, p. 145 (Voter Information Guide).) Where, as here, the voters have attached a condition to the Legislature's power to amend their initiative, our state Constitution compels us to enforce it. (*Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251 (*Amwest*), italics removed); see Cal. Const., art. II, § 10(c).) Because it is undisputed that Senate Bill 1391 (S.B. 1391) *amends* Proposition 57 by largely taking away a juvenile court's power to transfer cases to courts of criminal jurisdiction involving more egregious crimes committed by 14- and 15-year-olds (§ 707, subd. (a)(2)), the constitutional validity of S.B. 1391 turns on whether S.B. 1391 is "consistent with and furthers the intent" of Proposition 57.

As the majority also ably explains, figuring out Proposition 57's intent is more easily said than done. Although the so called "majority view" of the Courts of Appeal is that S.B. 1391 is consistent with Proposition 57's intent, those courts have traveled a multitude of different—and, at times, conflicting—paths to get to their common conclusion.

In my view, the root of this confusion may lie with the fact that Proposition 57 seeks to achieve multiple aims, many of which conflict.

The pertinent text of Proposition 57 expressly empowers juvenile courts to transfer to adult court the cases of 14- and 15-year-old juveniles accused of certain, more egregious crimes. (Former § 707, subd. (a)(2).) The "Purpose and Intent" section of Proposition 57 expressly enumerates five "purpose[s] and intent[s] of the people" in enacting the initiative: (1) to "[p]rotect and enhance public safety," (2) to "[s]ave money by reducing wasteful spending on prisons," (3) to "[p]revent federal courts from indiscriminately releasing prisoners," (4) to "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles," (5) to "[r]equire a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141.)

Some of these intents are in tension with one another. Proposition 57 aims to protect and enhance public safety, and public safety is often furthered by incarceration—whether it be detaining a suspect pending trial (Pen. Code, § 1275, subd. (a)(1) ("protection of the public" relevant in setting bail)), imposing a longer prison sentence after conviction (see Cal. Rules of Court, rules 4.414 [factors relating to whether to grant probation], 4.421 [circumstances in aggravation that may justify longer period of incarceration]), or denying parole (Pen. Code, § 3041, subd. (b)(1)). Yet, Proposition 57 also aims to "[s]ave money" and "emphasiz[e] rehabilitation," both of which counsel against incarceration.

That Proposition 57 embodies multiple, conflicting intents is hardly surprising, as legislation often reflects a "balance [of]

competing policy concerns." (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 122.) Proposition 57's pertinent text, as well as the fifth enumerated purpose that tracks that text, ostensibly reflect the balance that Proposition 57 struck because the proposition generally seeks to save money and emphasize rehabilitation while simultaneously granting juvenile courts the discretion to transfer to adult court the cases involving juvenile offenders who pose the greatest risk to public safety.

But where, as here, a voter initiative reflects a compromise between conflicting intents, how are the courts to evaluate whether later enacted legislation is "consistent with and furthers" those intents?

The varied paths traveled by the Courts of Appeal in assessing the constitutional validity of S.B. 1391 reflect some of the challenges that arise in making this evaluation. Three are prominent.

First, what should the courts look at in determining the intent behind an initiative? Some courts focus solely on the initiative's statutory text, ostensibly applying the maxim of statutory construction that the starting and ending point for assessing a legislature's—or the voters'—intent is the language used in the enacted statute. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.) That is the path traveled by *O.G. v. Superior Court* (2019) 40 Cal.App.5th 626, 628-629 and Justice McKinster's dissent in *B.M. v. Superior Court* (2019) 40 Cal.App.5th 742, 764 (*B.M.*) (dis. opn. of McKinster, J.). Other courts focus on the initiative's stated purposes to the exclusion of its text. That is the path traveled by *People v. Superior Court (Alexander C.)* (2019) 34 Cal.App.5th 994, 1003 (*Alexander C.*) [it is a mistake to "equate" an initiative's "intent with each of [its]

specific provisions"]. And still other courts look to both the "initiative's specific language, as well as its . . . purpose[s]." (*Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374 (*Gardner*).)

Second, where an initiative has multiple enumerated intents or purposes (which may or may not include those embodied in the statutory text itself), how should a court determine which intent or purpose is *the* intent or purpose of the voter initiative? Some courts focus on the most analogous intent(s) or purpose(s). That is the path traveled by *People v. Superior Court (T.D.)* (2019) 38 Cal.App.5th 360, 373-374 (*T.D.*), *People v. Superior Court (S.L.)* (2019) 40 Cal.App.5th 114, 121 (*S.L.*), and the majority, all of which looked chiefly at one or both of the "juvenile-specific statement[s] of purpose and intent" enumerated in Proposition 57 (that is, the fourth and fifth enumerated purposes). Other courts focus on what intent or purpose is embodied by the majority of enumerated intents or purposes (e.g., best two out of three, three out of five). That is the path suggested by *Gardner*, which invalidated subsequent legislation that conflicted with two out of an initiative's three enumerated purposes. (*Gardner*, *supra*, 178 Cal.App.4th at pp. 1377-1378.) And still other courts focus on trying to divine and ascribe an "overriding" (*T.D.*, at p. 374), "high level" (*Alexander C.*, *supra*, 34 Cal.App.5th at p. 1004), "major" (*People v. Superior Court (K.L.)* (2019) 36 Cal.App.5th 529, 539 (*K.L.*); *Gardner*, *supra*, 178 Cal.App.4th at p. 1374), "fundamental" (*K.L.*, at p. 539; *Gardner*, at p. 1374), "overall" (*S.L.*, at p. 122) or "broad" (T.D., at p. 371) purpose to the initiative. As one might expect, the outcome of any inquiry into *the* intent of an initiative is largely a function of how that inquiry is phrased.

Third, what weight, if any, should a court give to the later legislature's declaration that its amendment is consistent with the voters' intent in enacting the initiative? S.B. 1391 "declares" that it "is consistent with and furthers the intent of Proposition 57." (S.B. 1391, § 3.) Some courts have accorded this declaration "great weight." This is the path traveled by *T.D.*, *supra*, 38 Cal.App.5th at pp. 370-371. Other jurists have accorded the declaration very little weight, ostensibly because it is post hoc, it can be self-serving and, like René Magritte's famous painting depicting a pipe but stating "This is Not A Pipe" (in French), can be objectively inaccurate. (*B.M.*, *supra*, 40 Cal.App.5th at p. 765 (dis. opn. of McKinster, J.)).

Fortunately, our Supreme Court has granted review in nearly all of these cases and will thus likely provide a definitive answer to whether S.B. 1391 is "consistent with and further[s]" Proposition 57's intent. In the course of providing this answer, we may also obtain much-needed guidance on the questions posed above and, hence, on the path we should travel in the future when determining the intent and purpose animating initiatives.

Until we have this guidance, I part ways with the majority.

Like the majority, I agree that our task is to "'start[] with the presumption that the Legislature acted within its authority' and uphold the validity of the legislative amendment 'if, by any reasonable construction, it can be said that the statute furthers the purposes' of the initiative." (*People v. DeLeon* (2017) 3 Cal.5th 640, 651, quoting *Amwest*, *supra*, 11 Cal.4th at p. 1256.)

Unlike the majority, I disagree that this presumption has been rebutted.

In my view, it is not possible to construe S.B. 1391's withdrawal of discretion to transfer cases involving some 14- and

15-year-old juveniles to be consistent with Proposition 57's pertinent text conferring such discretion. However, I do not subscribe to the view that the text of Proposition 57 is the sole embodiment of its intent and purpose, such that any and every amendment that modifies that text is for that reason impermissible. Were that the rule, Proposition 57's express authorization of amendments consistent with its purpose would be a nullity. (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038 ["courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage"].) The majority recognizes as much when it hypothesizes valid legislative amendments to a juvenile court's power to transfer cases that would eliminate some—but not all—of that power; if *any* alteration of that power were enough to be inconsistent with Proposition 57's intent, none of the majority's hypothetical amendments would be valid.

In my view, it *is* possible to reasonably construe S.B. 1391 to be consistent with and to further Proposition 57's five enumerated purposes and intents, particularly given the judicial mandate to harmonize an enactment's conflicting intents or purposes (e.g., *Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1099; *Faulder v. Mendocino County Bd. of Supervisors* (2006) 144 Cal.App.4th 1362, 1372-1373). S.B. 1391 certainly furthers Proposition 57's purposes of saving money, emphasizing rehabilitation, and preventing the federal courts from indiscriminately releasing prisoners due to overcrowding. S.B. 1391 ostensibly furthers Proposition 57's purpose of reserving to juvenile court judges the power to decide whether juvenile offenders should be tried in adult court because, even

after S.B. 1391, those judges still retain the power to decide whether 16- and 17-year-old juveniles should be transferred to criminal court. And S.B. 1391 can be construed to further Proposition 57's purpose of enhancing public safety, at least in light of the evidence in the "legislative history" underlying Proposition 57 that the rehabilitation of juveniles through juvenile court ostensibly protects public safety in the long-run by discouraging recidivism (accord, *B.M.*, *supra*, 40 Cal.App.5th at pp. 755-757), even if, in the short term, S.B. 1391 results in persons like Tony B.—who stabbed an elderly woman 41 times rather than leave the house he was burglarizing and whom the juvenile court determined, after a three-day hearing, not to be amenable to treatment and rehabilitation as a juvenile—being released back into the community in their 20s once juvenile court jurisdiction expires. To me, this is a close question. But in such situations, the tie goes to constitutionality.

For these reasons, I would deny the writ petition.

_____, J.
HOFFSTADT